ANIKA INSURANCE BROKERS SDN BHD & ANOR

v.

PUBLIC BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[CIVIL SUIT NO: D1-22-891-2002]
29 MARCH 2004

CIVIL PROCEDURE: *Pleadings - Striking out - Grounds for - Whether second plaintiff had reasonable cause of action- Whether there was privity of contract - Contracts Act 1950, s. 179 - Rules of the High Court 1980, O. 18 r. 19(1)*

CIVIL PROCEDURE: *Summary judgment - Appeal - Appeal against senior assistant registrar's decision in allowing plaintiff's application for summary judgment under O. 14 of Rules of the High Court 1980 - Triable issues - Whether first plaintiff vicariously liable for losses suffered - Probability of defendant succeeding at full trial*

This was the defendant's appeal against the decision of the Senior Assistant Registrar (SAR) in dismissing their application to strike out the second plaintiff's claim against them under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('RHC) (encl. 16) and against the decision of the SAR allowing the plaintiff's application for summary judgment under O. 14 of the RHC (encl. 22). The first plaintiff, a reinsurance broker, acted as agents for the second plaintiff, an insurance company. The first plaintiff had handed three cheques in favour of Sorema SA (Labuan), one reinsurer, to one Lee Meng Pang, a purported representative of Sorema SA (Labuan). However, the first plaintiff discovered that the defendant had wrongfully credited the proceeds of the three cheques into Sorema SA (Services's) account. Subsequently, Sorema SA (Labuan) disavowed any knowledge or acceptance of risks on insurance policies undertaken by the second plaintiff. The plaintiffs alleged that the defendant had wrongfully converted their cheques and sought a refund.

Held:

[1] The first plaintiff was acting as the second plaintiff's agent and the monies paid out for the premiums were actually from the second plaintiff. Thus, the question of lack of privity of contract between the second plaintiff and the defendant did not arise because the second plaintiff's right to commence this suit derived from the principal-agent relationship between the plaintiffs.

Section 179 of the Contracts Act 1950 recognises this right. The defendant's claim that the second plaintiff had no reasonable cause of action was unsustainable. (pp 285 h & 286 a)

[2] For the second appeal (encl. 22), the three cheques were handed over to Lee Meng Pang sometime between 30 October 2001 and 8 November 2001. However, Lee Meng Pang ceased to be an employee as of 12 July 2001. Despite this, the first plaintiff had continued placing out risks on insurance policies to Sorema SA (Labuan) through Lee Meng Pang. This raised the question of whether by continuing to transact through Lee Meng Pang, the first plaintiff had negligently contributed to their own losses, thus making the first plaintiff vicariously liable. Furthermore, the defendant may in all probability succeed at the trial in invoking s. 85 of the Bills of Exchange Act 1949 for protection. (p 288 a-e)

[3] The defendant had consistently maintained that they had acted in good faith and without negligence. The onus of proving so fell on the defendant. In light of the circumstances, the defendant must be given an opportunity to discharge this burden in the course of a full trial. (p 289 b-c)

[Defendant's appeal in encl. 16 dismissed; defendant's appeal in encl. 22 allowed with costs; SAR's order allowing plaintiffs' application for summary judgment set aside.]

Case(s) referred to:
Bandar Builder Sdn Bhd & Ors v. UMBC [1993] 4 CLJ 9 SC ***(refd)***
Holt v. Ely [1853] 1 E & B 794 ***(refd)***
Langton v. Waite [1868] LR 6 Eq 165 ***(refd)***
Suppuletchumi v. Palco Bina Sdn Bhd [1994] 2 CLJ 561 HC ***(refd)***
Teheran-Europe Co Ltd v. ST Belton (Tractors) Ltd [1968] 2 All ER 886 ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Yap Moi v. Hong Leong Bank Bhd [2002] 3 CLJ 562 CA ***(refd)***

Legislation referred to:
Bills of Exchange Act 1949, s. 85
Contracts Act 1950, s. 179
Courts of Judicature Act 1964, s. 68(1)
Rules of the High Court 1980, O. 14, O. 18 r. 19(1)(a)

For the appellant/defendant - Christene Tee; M/s Raja Eleena Siew Ang & Assocs
For the respondent/plaintiff - Shaikh Abdul Saleem; M/s Anad & Noraini

Reported by Suhainah Wahiduddin

JUDGMENT

Vincent Ng J:

Preamble

Before are the defendant's appeals, namely:

(i) Enclosure 16 – against the decision of the learned senior assistant registrar (SAR) dated 5 November 2002, dismissing their application to strike out the second plaintiff's claim against them under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 (RHC); and

(ii) Enclosure 22 – against the decision of the learned SAR dated 7 March 2003, allowing the plaintiffs' application for summary judgment under O. 14 of the RHC.

Background Facts

The first plaintiff, a reinsurance broker, acted as agents for the second plaintiff, an insurance company. As the second plaintiff's agent, the first plaintiff was entrusted to place out risks on insurance policies undertaken by the second plaintiff to other reinsurers. One such reinsurer was Sorema SA (Labuan). Upon the first plaintiff's confirmation that the risks have been reinsured, the second plaintiff would remit the necessary premium payments to the first plaintiff. The first plaintiff, in turn, would forward the said premium payments to the reinsurers after deducting commission due to themselves.

In the course of their normal business and on the second plaintiff's instructions, the first plaintiff issued three cheques for a total of RM1,687,883.64 in favour of Sorema SA (Labuan). The cheques were handed over to one Lee Meng Pang, a purported representative of Sorema SA (Labuan).

The first plaintiff subsequently discovered that the defendant had wrongfully credited the proceeds of the three cheques into Sorema SA (Services)'s account. Sorema SA (Labuan) disavowed any knowledge or acceptance of risks on insurance policies undertaken by the second plaintiff.

The plaintiffs alleged that the defendant wrongfully converted their cheques and were seeking a refund.

The First Appeal

The defendant sought to strike out the second plaintiff's claim on the grounds that the second plaintiff had no reasonable cause of action against them as the statement of claim was bereft of any particulars pertaining to their liability to the second plaintiff.

The defendant maintained that as the second plaintiff was neither the true owner of the cheques nor their customer, there was no privity of contract between them and as the undisclosed principal of the first defendant, the second plaintiff could not sustain any claim against the defendant.

This defendant's application called for a careful perusal of the plaintiffs' amended statement of claim. After identifying and describing the plaintiffs individually, the relevant paragraphs in the pleadings read as follows in:

> 3. **The first plaintiff was at all material times** a reinsurance broker **acting on behalf of the second plaintiff** in reinsurance transactions …
>
> 6. **The first plaintiff was entrusted by the second plaintiff** to place out the risks …
>
> 7. **… the second plaintiff remitted** to the first plaintiff **the necessary premium payments** … for the first plaintiff's onward transmission …
>
> 8. **The first plaintiff, as instructed by the second plaintiff**, drew the cheques …
>
> 10. … the second plaintiff … were told by Sorema that Sorema did not have any knowledge of the said risks and therefore they disavowed acceptance of the risks …
>
> 11. … the second plaintiff was forced to place out the risks …
>
> 12. In the premises, the defendant has converted the cheques … **the first and second plaintiffs have suffered damage**.
>
> 14. **The first and second plaintiffs have suffered losses** as a result of the defendant's negligence … (emphasis added).

Reading the pleadings in its entirety, I find that the second plaintiff's cause of action is sufficiently pleaded as a claim under the tort of conversion and for monies had and received. There is no doubt that the first plaintiff was acting as the second plaintiff's agent and that the monies paid out for the premiums were actually from the second plaintiff. The first plaintiff merely transmitted the monies for the second plaintiff, *vide* the three cheques.

The question of lack of privity of contract between the second plaintiff and the defendant does not arise because the second plaintiff's right to commence this suit is derived from the principal-agent relationship between the plaintiffs. Section 179 of the Contracts Act 1950 recognises this right for the section provides:

> Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

In *Teheran-Europe Co Ltd v. S.T. Belton (Tractors) Ltd* [1968] 2 All ER 886 at 889 Lord Denning MR held that:

> It is a well-established rule of English law that an undisclosed principal can sue and be sued on a contract, even though his name and even his existence are undisclosed …

This view was supported by Lord Diplock LJ:

> Where an agent … enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all. …

and echoed by Lord Sachs LJ:

> … a principal can always step in and enforce the contract if his name was unmentioned or even his existence was undisclosed at the time the contract was made.

(See *Holt v. Ely* [1853] 1 E&B 794 and *Langton v. Waite* [1868] LR 6 Eq 165.)

Conclusion

The principals relating to striking out applications are well settled. (See *Bandar Builder Sdn Bhd & Ors v. UMBC* [1993] 4 CLJ 7 and *Suppuletchumi v. Palco Bina Sdn Bhd* [1994] 2 CLJ 561.)

My perusal of the statement of claim reveals that there is nothing in the statement of claim that lends credence to the defendant's allegation that the second plaintiff's claim is obviously unsustainable. In *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 (PC), Lord Diplock had warned that:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost of care.

Bearing his advice in mind, I decided to dismiss the defendant's appeal in encl. 16 with costs.

The Second Appeal

All three cheques made out by the first plaintiff were in favour of Sorema SA (Labuan) and were marked 'Non-negotiable', endorsed 'Account payee only' and had the word 'bearer' crossed out.

The plaintiffs made heavy weather of the Court of Appeal case of *Yap Moi v. Hong Leong Bank Bhd* [2002] 3 CLJ 562 (Yap Moi) to drive home the point that the defendant's defence did not raise any triable issues.

In *Yap Moi*, Dato Faiza Thamby Chik delivering the judgment of the court held at p. 567 that:

> I am of the view that the respondent (the Bank) acted contrary to all known and accepted norms in blatantly disregarding the endorsement 'account payee only', 'not negotiable' and the cancellation of 'or bearer/atau pembawa'. **In the circumstances**, the respondent bank acted in reckless disregard of the clear mandate to the loss and detriment of the named payee and true owner. (emphasis added).

I am completely ad idem with my learned brother. Although the plaintiffs took great pains to emphasize that the facts in *Yap Moi* were on all fours with the present case, I cannot agree.

The striking similarity is of course the fact that all the cheques that were the subject matter of the conversion in *Yap Moi*, as in the present case, were marked 'Non-negotiable', endorsed 'Account payee only' and had the word 'bearer' crossed out. Despite these precautions, one Ng Hong Chai who came into possession of all the cheques without the knowledge, consent or authority of *Yap Moi,* was able to bank in the cheques into his account.

The material difference between these two cases is that in *Yap Moi*, the Court of Appeal found as a fact that two bank employees colluded with Ng Hong Chai and facilitated the conversion of the cheques. These crucially adverse facts led the Court of Appeal to hold that the bank could not rely on s. 85 of the Bills of Exchange Act 1949 (the Act) for any protection.

The statutory protection, which is sparingly accorded, requires the satisfaction of two conditions precedent, namely that the bank had to have acted in good faith and without negligence.

In the present case, there were no allegations of collusion by the defendant. The villain in this tale seems to be Lee Meng Pang, to whom the first plaintiff handed over the three cheques. Although the plaintiffs sought to downplay his role in this case to that of a mere postman, I am troubled because the defendant has maintained that Lee Meng Pang had contributed to the circumstances that led to the three cheques being converted. At the material time the three cheques were handed over to him, sometime between 30 October to 8 November 2001, Lee Meng Pang was no longer an employee of the Singapore branch of Sorema SA (Labuan). In fact, he has ceased to be an employee as of 12 July 2001.

Despite this, the defendant alleged that the first plaintiff and several other reinsurance brokers had continued placing out risks on insurance policies to Sorema SA (Labuan) through Lee Meng Pang and sometimes the premium payments by way of cheques have been made out to Sorema SA (Services).

These circumstances, I believe, raises the question of whether by continuing to transact through Lee Meng Pang, the first plaintiff had negligently contributed to their own losses. Alternatively, whether Lee Meng Pang was acting as the first plaintiff's agent in transacting with the defendant, thus making the first plaintiff vicariously liable for their losses. Furthermore, besides the issue of contributory negligence, the defendant may in all probability succeed at the trial in invoking s. 85 of the Act, considering that they have tendered in affidavit evidence as aforesaid, the circumstances in which the said cheques were paid out. Section 85 reads as follows:

> 85. Protection of bankers collecting payment of cheques, or certain other instruments.
>
> (1) Where a banker, in good faith and without negligence:
>
> (a) receives payment for a customer of an instrument to which this section applies; or
>
> (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
>
> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.
>
> (2) This section applies to the following instruments, namely:
>
> (a) cheques;
>
> (b) any document issued by a customer of a banker which, though not a bill of exchange, is intended to enable a person to obtain payment from that banker of the sum mentioned in the document;

(c) any draft payable on demand drawn by a banker upon himself, whether payable at the head office or some other office of his bank.

(3) A banker is not to be treated for the purposes of this section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, indorsement or an instrument.

Conclusion

The defendant has consistently maintained that they acted in good faith and without negligence and the onus of proving so, falls on them. In light of the circumstances set out above, I am of the opinion that the defendant must be given an opportunity to discharge this burden in the course of a full trial.

After careful consideration of all five affidavits and the submissions put in by both sides, I decided to allow the defendant's appeal in encl. 22 with costs. The learned SAR's order allowing the plaintiffs' application for summary judgment is hereby set aside.

Postscriptum

Instead of appealing against the decision on these two enclosures, both parties should have focused their efforts on getting up the matter for trial, as, under the proposed amendments to s. 68(1) of the Courts of Judicature Act 1964 (of which I am a member of the sub-committee) such decisions would become non-appealable to the Court of Appeal.